Supreme Court, U.S.
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No. 01-477

In The

Supreme Court of the United States

FOSTER F. BURGESS,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The Florida District Court Of Appeal, First District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A WILDERNESS WETLANDS RETAINS ECONOMICALLY VIABLE USE WHEN IT HAS BEEN USED RECREATIONALLY FOR DECADES, CAN STILL BE USED FOR THE SAME PURPOSES, MAY BE IMPROVED WITH A SMALL DOCK OR BOARDWALK, AND HAS GREATLY APPRECIATED IN VALUE.

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STATEMENT OF THE CASE

The property which Petitioner claims retains no economically viable use is part of a wetlands wilderness area in the Florida Panhandle. (Tr. at 9, 18; Plaintiff's Ex. 1A at 6.) It is located within the basin of the Choctawhatchee River, designated an Outstanding Florida Water under state law. (Ex. H to Burg. Aff. ¶ 1.) Petitioner bought the property for $550 at a tax sale because he believed it would appreciate in value and be "ideal for recreation use" by hunters and fishermen. (Tr. at 72.) The property's intended use was for his own recreation or to sell to others for their recreational use. (Burg. Dep. at 66.)

Petitioner used his property for decades for boating, fishing, and nature walks. (Pet. Brief at 2; Burg. Dep. at 9.) After thirty years he decided to enhance its recreational value by constructing a roofed shelter on stilts to "be used for overnight camping, fishing, and enjoyment of the wilderness nature of the area and [its] wildlife." (Plaintiff's Ex. 1A at 6.) He sought to construct the shelter on a platform of more than 1000 square feet, and he planned to transport a "porta potty" to and from the camping shelter by boat. (Tr. at 79, 30.) No sewage or utility connections exist in this remote area, which is accessible only by boat and completely inundated eight to twelve months per year. (Tr. at 55, 143.)

The Department of Environmental Protection has indicated that Petitioner could construct a 500-foot dock without any permit and might well receive permission for other recreational structures such as a boardwalk. (Tr. at 154, 158.) However, Petitioner was denied a permit for the requested cabin on stilts, and an administrative law

judge upheld the denial for environmental reasons. (Ex. H to Burg. Aff. ¶¶ 22-24.) Rather than appealing the permit denial judicially, Petitioner brought an action for inverse condemnation.

Despite the permit denial, Petitioner believes his unimproved property is worth "many times" what he paid for it. (Burg. Dep. at 29.) The property remains suitable for boating, fishing, hunting, and ecotourism. (Tr. at 157-58.) Deer hunting occurs nearby and Petitioner has observed deer and wild hog tracks on his property. (Tr. at 21; Burg. Dep. at 9.) Although one sale fell through, (Tr. at 98), Petitioner presented no other evidence that he could not beneficially use, sell, or lease the property for boating, fishing, hunting, or other recreation. He sold a similar unimproved wetlands tract at a profit. (Burg. Dep. at 25.) Although he believes the property would be much more valuable for recreation with the desired camping shelter, (*id.* at 29), he also states some people would like to own the property simply in order to "tie up their boats and fish there." (*Id.* at 28.) A number of boaters have approached him over the years about purchasing such a tract. (*Id.* at 6.)

Florida's First District Court of Appeal determined that these facts did not establish that the property was completely valueless and no use to Petitioner. *State Dep't of Environmental Protection v. Burgess*, 772 So. 2d 540, 543 (Fla. 1st DCA 2000), *review denied*, 791 So. 2d 1095 (Fla. 2001). The state court noted that the property had greatly appreciated in value, retained the same recreational use it always had, and could be improved with a more modest recreational structure. *Id.* The court termed "disingenuous" Petitioner's claim that this property lacked any

economically viable use since it remained "eminently suitable for the use for which he bought it and to which he has put it these many years." *Id.* After reaching these conclusions the court also discussed Petitioner's investment-backed expectations. *Id.* at 543-44.

The Florida Supreme Court denied discretionary review. (Pet. Brief, App. A-1.)

REASONS FOR DENYING THE WRIT

This Court should deny review of the state appellate court's fact-specific adjudication that this particular wilderness property in the Florida Panhandle retained substantial recreational value despite denial of permission to construct a roofed camping shelter.

Certiorari review by this Court is "not a matter of right"; it is granted "only for compelling reasons." Sup. Ct. R. 10. The Court may, in its discretion, grant review of an opinion of a state court of last resort based on conflict with opinions of this Court, federal appellate courts, or other highest-level state courts. Sup. Ct. R. 10(b),(c). However, for reasons both of comity and practicality, the Court avoids unnecessary review of state judgments. *See Adams v. Robertson*, 520 U.S. 83, 90-92 (1997) (dismissing writ of certiorari as improvidently granted).

In this case, there is no "compelling reason" to review the state court's fact-specific adjudication that Petitioner retained economically viable use of his property. *See* Sup. Ct. R. 10. Nor is there any reason to address

whether investment-backed expectations are an additional requirement for a categorical regulatory taking since such review would not change the result in this case.

I. THE QUESTION WHETHER INVESTMENT-BACKED EXPECTATIONS CONSTITUTE A SEPARATE CRITERION FOR A "CATEGORICAL" REGULATORY TAKING WAS NOT SQUARELY PRESENTED IN THE PRESENT CASE.

Petitioner has asked this Court to use this case to address whether a claimant's "investment-backed expectations" are a separate criterion besides "no economically viable use" in determining whether government regulation has deprived property of all value. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-17 (1992) (addressing "categorical" takings); *see also Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (holding that considerations such as pre-existing regulatory schemes are not part of a "total wipe-out" taking analysis). However, in the present case such review would be an unnecessary interference with the state judicial system.

In cases where no categorical taking is found because the property retains substantial value, the question is not "squarely before the court" whether investment-backed expectations constitute an additional component of the

analysis. *See Palm Beach Isles*, 231 F.3d 1359 (discussing earlier federal cases).[1]

In the present case, Burgess's own brief to the state appellate court described the "principal issue on appeal" as whether his property had been denied all beneficial use. (Ans. Brief at 13.) The state court's decision turned on that issue, and any additional discussion of investment-backed expectations was unnecessary dictum. *See Palm Beach Isles*, 231 F.3d at 1359; *cf. also Street v. New York*, 394 U.S. 576, 581 (1969) (inquiring whether a question was presented to the state court "in such a manner that it was necessarily decided by" the state court).

Where this Court's intervention would not change the result, the Court would merely be issuing an advisory opinion rather than determining an actual case or controversy. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (explaining the reason for the "independent state ground" doctrine). If "resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Id.* at 730.

In the present case, resolution of the question whether investment-backed expectations constitute an additional component of a categorical taking would not affect the judgment that there is no categorical taking in this case because Mr. Burgess retains economically viable use of his property.

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[1] For the same reasons, the question was not squarely before this Court in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001) (holding no categorical taking occurred because the property retained substantial value).

II. THE FLORIDA APPELLATE COURT'S ADJUDICATION OF ECONOMICALLY VIABLE USE PRESENTS NO CONFLICT WITH *PALAZZOLO* OR ANY OTHER STATE OR FEDERAL OPINION.

Neither this Court, nor any other court, has ever promulgated a "per se" rule that recreation cannot constitute an economically viable use of property.[2] Whether a particular property retains recreational value is a matter for case-by-case adjudication. This Court has held that the question of economically viable use is predominantly a question of fact. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999).

Contrary to Petitioner's assertions, (Pet. Brief at 10-11), the *Lucas* case never addressed possible recreational uses of Mr. Lucas's property because that question was not properly raised before the Court. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 n.9 (1992) (declining to entertain an argument not raised in opposition to the petition for certiorari). However questionable might be the trial court's finding that Mr. Lucas's unimproved beachfront property was valueless, the Court "must accept the finding as entered below." *Id.* at 1033-34 (Kennedy, J., concurring).

Nor was the question of recreational value raised in the *Palazzolo* case. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2464-65 (2001) (holding the landowner was not left with a "token interest"). Whether Mr. Palazzolo's land

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[2] Although Petitioner characterizes the state court as using some sort of "per se" rule, (Pet. Brief at 10), in fact the state court engages in careful, fact-specific analysis.

would have value without his ability to construct a residence was not an issue before the Court. Moreover, the facts in *Palazzolo* were quite different from the present case: residences existed nearby, and nothing was mentioned concerning past or future recreational uses for the unimproved property. *Id.* at 2455. The record before the state court in the present case, in contrast, established genuine, substantial value for Mr. Burgess's remote land in the Florida Panhandle.

The present case is completely consistent with this Court's view that total, "categorical" takings by government regulation represent "extraordinary circumstance[s]" and "relatively rare situations." *See Lucas*, 505 U.S. at 1017-18. As the Federal Circuit has interpreted *Lucas*, a categorical taking represents "the total wipeout situation," equivalent to a physical taking, leaving the owner with nothing but "bare legal title." *Palm Beach Isles*, 231 F.3d at 1361, 1363. Neither *Lucas* nor *Palazzolo* offers any ground for this Court to interfere with the state court's fact-based adjudication that this specific case is not one of those rare instances of "total wipeout."

Petitioner tries to bolster his "conflict" argument by referring to two state-court decisions finding particular pieces of property to lack economically viable use for recreation. (Pet. Brief at 11-12.) Because both these cases rest on their own specific facts, however, there is no conflict with the state court's decision in *Burgess*.

In *McQueen*, the trial court's finding of no viable economic use was based on testimony that Mr. McQueen could do *nothing* with his lots, "including park a boat on

one," and the government's concession that any recreational value to Mr. McQueen was "kind of indirect" and "really probably not directly recreational." *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. Ct. App. 1998), *reversed on other grounds*, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, and remanded*, 121 S. Ct. 2581 (2001).

Moreover, in *McQueen* the finding of no viable economic use was not appealed to the state's highest court. *See McQueen*, 530 S.E.2d at 631 ("It is *uncontested* the permit denial at issue here deprives respondent of all economically viable use of his property") (emphasis added). Even if there were a conflict between the South Carolina appellate decision and the Florida appellate decision, which there is not, such conflict would not constitute "compelling reason" for review by this Court. *See* Sup. Ct. R. 10(b) (referring to conflicts between state courts "of last resort").

The remaining case cited by Petitioner (also not from a state court of last resort) arose from "unique circumstances," an "egregious factual situation" where residential property was downzoned to open space by mistake and without notice to the true owner. *Steel v. Cape Corp.*, 677 A.2d 634, 645, 650 (Md. Ct. Spec. App. 1996). The state court noted that the property "does not have natural features which prohibit development," is "virtually surrounded by" development, and is across the street from a shopping center. *Id.* at 638, 650. On these facts the court held refusal to rezone the property "constitutes an impermissible regulatory taking." *Id.* at 651 (affirming a court order to rezone the property back to residential).

McQueen and *Steel* address dramatically different facts from those in *Burgess*. Mr. Burgess's property is in a remote wetlands area completely inundated by water eight to twelve months per year. (Tr. at 55, 143.) He bought it for recreation, used it for recreation, and still wants to use it for recreation: "for overnight camping, fishing, and *enjoyment of the wilderness nature of the area and [its] wildlife.*" (Plaintiff's Ex. 1A at 6, emphasis added.) He wanted a cabin on stilts simply to enhance the existing recreational value. (*See* Burg. Dep. at 28-29.) Less intrusive improvements were feasible. (Tr. at 154, 158.) Without the requested camping shelter Petitioner's land is still "eminently suitable" for boating, fishing, hunting, and the other recreational purposes for which he bought it. *Burgess*, 772 So. 2d at 543.

In Florida, perhaps more than in any other state, a recreational use need not leave land "economically idle." (Contrast Pet. Brief at 11.) Mr. Burgess himself believes that some people would like to own the property for recreational fishing, and over the years several boaters have approached him about the property. (Burg. Dep. at 28, 6.) Although one sale fell through, the evidence does not establish inability to lease or sell the land for the same recreational purposes for which he bought the land. Petitioner has been able to sell a similar unimproved wetlands lot at a profit. (Burg. Dep. at 25.) Far from retaining only a "token interest," (Pet. Brief at 11), Petitioner's property has appreciated "many times" in value. (Burg. Dep. at 29.) On these facts there can be no doubt that recreation is an economically viable use of Petitioner's property.

The state court's consideration of the property's appreciation in value is completely consistent with opinions by the Federal Circuit analyzing economically viable use. In a case cited by Petitioner as in accord with *Palm Beach Isles*, (Pet. Brief at 8), the Federal Circuit explains as follows:

> In determining whether a taking is categorical, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986); *see Forest Props., Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (the fact that, despite the challenged regulatory restraint, the value of the subject property increased more than three-fold in 11 years "itself undermines Forest's contention that its property was taken").

Rith Energy, Inc. v. United States, 247 F.3d 1355, 1363 (Fed. Cir. 2001). As in *Rith*, *Florida Rock*, and *Forest Properties*, Petitioner's land retains far more than "nominal" value. *See Rith*, 247 F.3d at 1363.

No state or federal case indicates that recreation may never be an economically viable use of property. Indeed, the present case is consistent with a number of state and federal opinions indicating that recreation may constitute such a use. *E.g.*, *Wyer v. Board of Environmental Protection*, 747 A.2d 192, 193 (Me. 2000); *Darack v. Mazrimas*, No. Civ.A. 95-9659, 1996 WL 406270, at *3 (Mass. Super. Jul. 22, 1996); *Edmond v. Durfee*, C.A. No. 91-0237, 1996 WL 936873, at *5 (R.I. Super. Jan. 12, 1996); *Rybachek v. United States*, 23 Cl. Ct. 222, 225 (1991); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 608 (M.D. Fla. 1989); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 395

(1988); *Hendricks v. United States*, 14 Cl. Ct. 143, 156 (1987).

The state appellate court's judgment in *Burgess* presents no conflict with any decision by this Court or any other state or federal court. There is no compelling reason for this Court to interfere with the state court's adjudication that Petitioner's recreational property still has beneficial value.

CONCLUSION

For all the foregoing reasons the Petitioner's request for a writ of certiorari should be denied.

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Respectfully submitted,

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